92-1024

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

RONALD E. SEXTON, et al.,

Petitioners,

v.

MICHAEL P. VAUGHN, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a defendant is deemed to have waived the statutory laches defense set forth in 29 U.S.C. § 1399(b)(1) by failing to first pursue arbitration under 29 U.S.C. § 1401(a)(1).

PARTIES TO THE PROCEEDING

Respondents in this proceeding who were also plaintiffs before the United States District Court for the Western District of Missouri and appellees before the United States Court of Appeals for the Eighth Circuit are as follows: Michael P. Vaughn, present trustee of the Meatcutters Local 576; Cindi S. Nance, present trustee of the Meatcutters Local 576; Michael Craig, present trustee of the Meatcutters Local 576; Lynn Nutt, present trustee of the Meatcutters Local 576; W.W. Walderbach, present trustee of the Meatcutters Local 576; Lawrence S. Jenkins, present trustee of the Meatcutters Local 576; Employers Kansas and Missouri Pension Plan; Patricia Scott, trustee of Pension Plan; and James G. Sheehan.

Petitioners in this proceeding who were also defendants before the United States District Court for the Western District of Missouri and appellants before the United States Court of Appeals for the Eighth Circuit are as follows: Ronald E. Sexton, individually and in his representative capacities as statutory trustee of Franklin Investment Group, Ltd., KALCO, Inc. and SLC of North America, Inc; trustee of the Sexton Family Trust; and statutory trustee of Kalco-Illinois, Inc., Jacpad Corporate Financial Services, Inc., Barclays Leasing Ltd., Commonwealth Leasing Corporation, and Congressional Insurance Agency Inc.

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No. _____

In The

Supreme Court of the United States

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RONALD E. SEXTON, et al.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Ronald E. Sexton, individually and in his representative capacities as statutory trustee of Franklin Investment Group, Ltd., KALCO, Inc., and SLC of North America, Inc.; trustee of the Sexton Family Trust; and statutory trustee of Kalco-Illinois, Inc., Jacpad Corporate Financial Services, Inc., Barclays Leasing Ltd., Commonwealth Leasing Corporation, and Congressional Insurance Agency Inc., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 14, 1992, in order to resolve a conflict

between the Circuit Courts of Appeal on the important issue presented herein.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit which gives rise to this petition is reported at *Vaughn v. Sexton*, 975 F.2d 598 (8th Cir. 1992), and is reprinted in Appendix A hereto ("App. A") at page A1.

The memorandum decision of the United States District Court for the Western District of Missouri (Wright, D.J.) has not been reported. It is reprinted in Appendix A hereto at page A20.

JURISDICTION

On December 5, 1989, the District Court granted partial summary judgment for plaintiffs on Count I of their Amended Complaint. App. A20. That decision was based on certain conclusions of law set forth in the District Court's Order of December 8, 1989. App. A22. On January 18, 1990, the District Court modified its December 5 Order. App. A33.

On July 2, 1991, the District Court granted partial summary judgment for plaintiffs on Count II of their Third Amended Complaint and subsequently entered its judgment in this proceeding on August 14, 1991. App. A43.

On September 14, 1992, the Eighth Circuit entered an opinion affirming the decision of the District Court. No petition for rehearing was filed. Pursuant to 28 U.S.C. § 2101, this petition for certiorari has been filed within 90 days of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

29 U.S.C. § 1399 provides in pertinent part:

> (b) Notification, demand for payment, and review upon complete or partial withdrawal by employer.
>
> (1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall –
>
> (A) Notify the employer of
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments, and
>
> (B) Demand payment in accordance with the schedule.

29 U.S.C. § 1401 provides in pertinent part:

> (a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.
>
> (1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a

determination made under sections 1381 through 1399 of this title shall be resolved through arbitration.

STATEMENT OF THE CASE

A. Background

In April 1984, Wilson Foods sold Williams Meat to SLC, a corporation with Ronald Sexton as its sole stockholder. App. A2. On the same day, SLC sold its stock in Williams Meat to Franklin, a subsidiary corporation wholly owned by SLC. *Id.*

After the ownership of Williams Meat changed hands, Williams Meat entered into contract negotiations with the Meatcutters Union Local 576 ("Local 576") for a collective bargaining agreement to replace the contract scheduled to expire on August 7, 1984. App. A3. One component of that agreement was the funding of the Meatcutter's Pension Plan. *See id.*

In the summer of 1984 while Williams Meat was negotiating with Local 576 for a new collective bargaining agreement, the Teamsters' Union struck Williams Meat. App. A3 n.1. The Williams Meat meatcutters represented by Local 576 conducted a wildcat strike by refusing to cross the Teamsters' picket line. *Id.* Those meatcutters never thereafter returned to work for Williams Meat. *Id.*

With the ongoing wildcat strike and the employees refusing to work, negotiations for a replacement contract between Williams Meat and Local 576 broke down and never again resumed. *Id.* On August 7, 1984, the collective

bargaining agreement in question expired by its own terms, thus giving rise to plaintiffs' withdrawal liability claim only four months after Williams Meat had been purchased by SLC. App. A3.

In early 1987, Williams Meat filed for reorganization under Chapter 11 of the bankruptcy laws. *Id.* In late summer of 1987, the reorganization was converted into a Chapter 7 Bankruptcy. *Id.*

On January 15, 1988, the Trustees of the Meatcutters Pension Plan filed a bankruptcy proof of claim for withdrawal liability against Williams Meat. *Id.* On June 15, 1988, approximately four years after the last Local 576 meatcutter had worked for Williams Meat, the Plan sent notices of withdrawal liability to Sexton in his capacities as corporate representative of SLC and Franklin. App. A3-A4.

On August 31, 1988, the Plan notified Franklin and SLC that a default on the amount of withdrawal liability assessed would occur 60 days after receipt of the notices if withdrawal liability payments were not made. Appellants' Appendix filed in the Eighth Circuit ("Eighth Cir. App.") 32, 33. The Plan never notified Sexton that it was seeking withdrawal liability payments from him personally, from the Sexton Family Trust, or from any of the corporations or entities named as defendants in plaintiffs' Third Amended Complaint other than SLC and Franklin. None of the defendants requested that the Pension Plan's assessment of withdrawal liability be arbitrated pursuant to 29 U.S.C. § 1401.

Several events critical to this petition for certiorari occurred between August 1984 when the collective bargaining agreement expired and the dates plaintiffs filed

their proof of claim in the bankruptcy proceeding, notified SLC and Franklin of their claim, and filed their lawsuit. Significantly, at the time of the April 1984 sale, Wilson Foods "agree[d] to indemnify [SLC] harmless from any and all liabilities arising from the Meat Cutters Local 576 and Employees Kansas and Missouri Pension Plan's withdrawal liabilities affecting Williams Meat Company, Inc., arising out of the agreement for sale of Corporate stock between Wilson Foods Corporation and [SLC] dated April 2, 1984." Eighth Cir. App. 106.

In November 1987 after extended litigation, SLC and Wilson Foods settled various issues between them arising out of SLC's purchase of the Williams Meat stock from Wilson Foods, and SLC gave Wilson Foods a release of its claims. Eighth Cir. App. 107. The release stated that it was intended to cover:

> any and all claims, demands and causes of action of any kind whatsoever, asserted or otherwise, known or unknown, that either party may have against the other.

Eighth Cir. App. 108. SLC specifically released Wilson Foods

> from any and all claims, causes of action, or liability arising [in] any way out of, the sale by [Wilson Foods] to [SLC] of the capital stock of Williams Meat Company, Inc.

Id. SLC thereby forfeited its right to indemnity from Wilson Foods only a few months before respondents asserted their withdrawal liability claim against Williams Meat. If respondents had asserted their claim in a timely

fashion, SLC would have excluded that claim from the November 1987 release of Wilson Foods.

Additionally, important Williams Meat documents were apparently destroyed because of the passage of time between August 1984 and March 1989. At the time Williams Meat converted to Chapter 7 bankruptcy in late 1987, all corporate records were delivered to the custody of the bankruptcy trustee. While in the custody of the trustee at a local storage facility, the records disappeared and have not resurfaced.

B. Proceedings Below

On March 3, 1989, the Trustees filed suit against four defendants – SLC, Franklin, the Sexton Family Trust, and Ronald E. Sexton. App. A4. The plaintiffs initially named Sexton, SLC, Franklin and the Sexton Family Trust as defendants. *Id.* By May 1990, several other corporate entities affiliated with Ronald Sexton had been added as defendants. *Id.* None of those defendants had been notified of any withdrawal liability.

In their action, respondents sought recovery from petitioners for recovery of withdrawal liability payments under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1001 *et seq.* (1982). Under ERISA, if an employer withdraws from a multiemployer plan in a complete or partial withdrawal, the employer is liable to the plan in an amount determined to be the "withdrawal liability." *See* 29 U.S.C. § 1381(a).

An employer is deemed to have "completely withdrawn" from a multiemployer pension plan when it either permanently ceases to have obligations to contribute under the plan or permanently ceases all covered operations under the plan. *Crown Cork & Seal Co. v. Central States Southeast & Southwest Areas Pension Fund*, 881 F.2d 11 (3rd Cir. 1989). Payment can then be collected from persons or entities related to the employer if they are "trades or businesses" under "common control." 29 U.S.C. § 1391(b)(1).

On December 5, 1989, the District Court granted plaintiffs' Motion for Partial Summary Judgment on Count I of plaintiffs' Amended Complaint. App. A20. Pursuant to the provisions of ERISA, defendants were ordered to pay an interim judgment of $249,652 to plaintiffs, with defendants' liability to be determined later. *Id.* On January 18, 1990, the District Court modified its December 5 Order by permitting defendants to post a bond with the Clerk of the Court in the amount of the interim withdrawal liability in lieu of paying that amount to the Pension Plan. App. A33.

In its January 18 Order, the District Court also concluded that defendants Ronald E. Sexton individually and the Sexton Family Trust were permitted to challenge their status as employers. *Id.* On July 2, 1992, the District Court granted plaintiffs' Motion for Partial Summary Judgment on Count II of their Third Amended Complaint. App. A43. On August 14, 1991, the District Court ordered that judgment be entered in plaintiffs' favor and against all defendants in the total amount of $565,611.91. *Id.*

Defendants appealed the District Court's decision to the Eighth Circuit. On September 14, 1992, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's judgment and orders. App. A19.

The issue presented in this petition is thus whether by failing to pursue arbitration, the petitioners have waived their defense that respondents did not notify the employer of their withdrawal liability claim "as soon as practicable" as required by 29 U.S.C. § 1399(b)(1).

REASONS FOR GRANTING THE WRIT

I. THE ISSUE PRESENTED IN THIS PETITION IS IMPORTANT AND UNRESOLVED BY THIS COURT.

29 U.S.C. § 1399(b)(1) mandates that a plan sponsor must notify an employer of withdrawal liability "as soon as practicable" after the employer's withdrawal from the plan. The Eighth Circuit's decision in this case permits respondents to escape Congress' directive solely because petitioners did not seek arbitration under 29 U.S.C. § 1401.

The issue of waiving defenses by failing to pursue arbitration has been addressed by District Courts as well as Circuit Courts of Appeal, resulting in conflicting conclusions. The District Court below recognized that split of authority:

> By Order of December 8, 1989, this Court, well aware of a split in the circuit courts on this issue, adopted the rule that an employer which

> fails to timely pursue arbitration of an assessment of withdrawal liability under MPPAA waives any defenses it might have asserted in arbitration when pension plan trustees seek enforcement of withdrawal liability in federal district court.

App. A36.

On the date the District Court issued its Order, six out of twelve federal circuits had rendered conflicting opinions on the "arbitration/waiver" issue. *See, e.g., Mason & Dixon Tank Lines, Inc. v. Central States Southeast & Southwest Areas Pension Fund,* 852 F.2d 156, 167 (6th Cir. 1988) (permitting parties to bypass arbitration under certain circumstances); *Park South Hotel Corp. v. New York Hotel Trades Council,* 851 F.2d 578, 583 (2nd Cir.), *cert. denied,* 488 U.S. 966 (1988) (permitting parties to bypass arbitration when judicial economy would not be served); *Robbins v. Admiral Merchants Motor Freight, Inc.,* 846 F.2d 1054, 1056-57 (7th Cir. 1988) (holding that all defenses are barred if arbitration is not pursued); *Teamsters Pension Trust Fund v. Allyn Transportation Co.,* 832 F.2d 502, 504-06 (9th Cir. 1987) (holding that all defenses are barred if arbitration is not pursued); *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund,* 787 F.2d 897, 903 (3rd Cir. 1986) (permitting arbitration to be bypassed when District faces questions of statutory interpretation); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Industries,* 727 F.2d 1204, 1207-10 (D.C. Cir. 1984) (permitting parties to bypass arbitration when arbitration would not lead to the application of superior expertise or promote judicial economy).

The Tenth Circuit subsequently held that defenses which do not go to the merits of the liability assessment itself are not waived. *See In re Centric Corp.*, 901 F.2d 1514, 1518 (10th Cir.), *cert. denied sub nom. Trustees of Centennial States Carpenters Pension Fund v. Centric Corp.*, ___ U.S. ___, 111 S. Ct. 145 (1990). With its Order of September 14, 1992, the Eighth Circuit has now ruled that a defendant's failure to request arbitration waives a statutory laches defense.

In holding that an employer waives all defenses by failing to pursue arbitration, the District Court revealed that it was "significantly influenced" by the District Court's opinion in *Robbins v. Chipman Trucking, Inc.*, 693 F. Supp. 628, *aff'd*, 866 F.2d 899 (7th Cir. 1988). *See* App. A27-A28. With due respect to the District Court below, the better-reasoned line of cases on the waiver issue is represented by those federal circuit courts which have permitted the assertion of certain defenses which have not first been presented to an arbitrator. In order to resolve the conflict between the circuits, petitioners thus request that this Court review this important issue by granting petitioners' request for a writ of certiorari.

II. PETITIONERS DID NOT WAIVE THEIR LACHES DEFENSE BY FAILING TO PURSUE ARBITRATION.

Throughout the course of this case, petitioners have proceeded with their hands tied behind their backs because of the District Court's decision that they were barred from obtaining discovery and from asserting defenses because they had failed to pursue arbitration

under 29 U.S.C. § 1401. In so holding, both the District Court and the Eighth Circuit erred.

Section 1401 provides that "any dispute between an employer and the plan sponsor . . . concerning a determination under sections 1381 through 1399 of this title shall be resolved through arbitration." That arbitration provision is not a jurisdictional prerequisite to federal court action. *See I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d at 1207-08. *See also Sheet Metal Workers' Pension Fund v. Advance Metal & Welding Corp.*, 643 F. Supp. 1201, 1205 (N.D. Ga. 1986); *Central Transport, Inc. v. Central States Southeast & Southwest Areas Pension Fund*, 639 F. Supp. 788, 792-93 (E.D. Tenn. 1986).

The District of Columbia Circuit has also stated that " 'when the reasons supporting the doctrine [requiring arbitration] are found inapplicable, the doctrine should not be blindly applied.' " *Stockton*, 727 F.2d at 1209 (quotation admitted). Those reasons for which employers have been required to arbitrate disputes under the MPAA or risk losing their defenses have arisen when arbitration either leads to the application of superior expertise or promotes judicial economy. *See id.* at 1210.

The United States Bankruptcy Court for the Eastern District of Missouri has recently adopted the *Stockton* approach, quoting language from that opinion to the effect that when the reasons supporting the waiver doctrine are found inapplicable, it should not be "blindly applied." *See Matter of Interco Inc.*, 137 B.R. 993, 995 (Bankr. E.D. Mo. 1992).

The Tenth Circuit has also echoed this view by recognizing that "[g]enerally . . . the only defenses which are

waived by a failure to timely initiate arbitration are those which go to the merits of the liability assessment itself. . . . " *See Centric*, 901 F.2d at 1518. In *Centric*, the Tenth Circuit specifically recognized laches as a defense which is not waived:

> Laches in the prosecution of an action to collect the amount assessed is not such a defense [which is waived by failing to arbitrate], for it goes to the effect of a delay in bringing suit, not to the merits of the claim.

Id. As in *Stockton*, the Tenth Circuit in *Centric* recognized that the question of whether a particular defense has been waived by failing to pursue arbitration turns on considerations of "superior expertise" and "promotions of judicial economy." *Id.*

The Eighth Circuit thus erred in this case because it did not fully consider "superior expertise" and "judicial economy" in addressing the "arbitration/waiver" issue. Had the Court of Appeals properly evaluated those factors, it would have agreed with petitioners that the circumstances warranted bypassing arbitration for purposes of asserting a 29 U.S.C. § 1399 laches defense.

First, the facts concerning the timing of the trustees' notification to petitioners of their withdrawal liability claim are not in dispute. The sole issue remains one of statutory interpretation: whether that notification was "as soon as practicable" within the meaning of § 1401. *See Stockton*, 727 F.2d at 1210 n.16 (" '[w]here the only . . . dispute relates to the meaning of the statutory term . . . [the controversy] presents issues on which

courts, and not [arbitrators] are relatively more expert.' ") (Quotation omitted).

Secondly, requiring arbitration in this case would not have promoted judicial economy. In *Stockton,* the District of Columbia Circuit found no judicial economy because it appeared "highly improbable that a judicial action to vacate the award [would] not [have] followed immediately on the heels of the arbitrator's decision." *Id.* at 1210. The parties' history in this case supports the same conclusion.

The Court in *Stockton* also noted that the district court would still have had to consider other issues raised in opposition to the withdrawal liability claim, including a constitutional attack on retroactive liability under the MPPAA. *Id.* at 1210 and n.18. Similarly in this case, the District Court concluded that the issue of whether petitioners Sexton and the Sexton Family Trust were "control group" members could be presented directly to the Court without arbitration. App. A39-A40. That central issue was then fully considered by the District Court and the Eighth Circuit, so that judicial economy would not have been enhanced by requiring arbitration on the laches issue. *Id.*

The District Court below nevertheless erroneously barred defendants' assertion of *all* other defenses – whether or not they went to the merits of the withdrawal liability assessment. As discussed more fully in the background section above, respondents' delay in asserting a withdrawal liability claim has severely prejudiced petitioners, and petitioner Sexton in particular. Changes in

Williams Meat's business management, economic conditions and declining corporate profitability made it imperative in this case that any withdrawal liability claim be asserted promptly. Respondents' failure to do so bars their untimely claim. These severe ramifications and respondents' violation of Congress' directive support reversal of the District Court and Eighth Circuit's opinions.

Petitioners recognize that courts afford liberal interpretations to the MPPAA in order to preserve pensioners' benefits. Therefore, when Congress instructed that withdrawal liability claims should be asserted "as soon as practicable," it established a flexible standard to take into account the reason for any delay in asserting a claim and any prejudice to the defendant caused by the delay.

Under the facts of this case, neither considerations of "superior expertise" on the part of an arbitrator nor concerns of judicial economy warrant depriving petitioners of their laches defense by their failure to pursue arbitration. Petitioners respectfully submit that this case presents the Court with an opportunity to resolve the conflict presently existing on the question of the waiver of defenses by failure to pursue arbitration under 29 U.S.C. § 1401 and warrants the granting of a writ of certiorari to petitioners.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 91-3145

Michael P. Vaughn, Present Trustee of the Meatcutters Local 576, Cindi S. Nance, Present Trustee of the Meatcutters Local 576; Mike Craig, Present Trustee of the Meatcutters Local 576; Lynn Nutt, Present Trustee of the Meatcutters Local 576; W. W. Walderbach, Present Trustee of the Meatcutters Local 576; Larence S. Jenkins, Present Trustee of the Meatcutters Local 576; Employers Kansas and Missouri Pension Plan; Patricia Scott, Trustee of Pension Plan; James G. Sheehan;	*	Appeal from the United States District Court for the Western District of Missouri.
Appellees,	*	
v.	*	
Ronald E. Sexton, individually and in his representative capacities as Statutory Trustee of Franklin Investment Group, Ltd., Statutory Trustee of KALCO, Inc., Statutory Trustee of SLC of North America, Inc., Trustee of Sexton Family Trust, Statutory Trustee of Kalco-Illinois, Inc., Jacpad	*	

Corporate Financial Services, Inc., Barclays Leasing Ltd., Commonwealth Leasing Corporation and Congressional Insurance Agency Incorporated,

Appellant.

Submitted: April 16, 1992

Filed: September 14, 1992

Before JOHN R. GIBSON and BEAM, Circuit Judges, and ARNOLD,* District Judge.

ARNOLD, District Judge.

In April, 1983, Williams Meat and Wilson Foods, its corporate parent, filed for reorganization under the bankruptcy laws. In April, 1984, Wilson Foods sold Williams Meat to SLC, a corporation whose only stockholder is Ronald Sexton. On the same day, SLC sold its stock in Williams Meat to the Franklin Investment Group, a subsidiary corporation wholly owned by SLC. The sale of Williams Meat took the company out of the pending bankruptcy proceeding.

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* The HONORABLE MORRIS S. ARNOLD, United States District Judge for the Western District of Arkansas, sitting by designation. Since this case was submitted, Judge ARNOLD was appointed to the Eighth Circuit Court of Appeals.

At the time of the sale, the United Food and Commercial Workers Union represented the meatcutters at Williams Meat. Under the collective bargaining contract then in force with the union representing the meatcutters, the company was obligated to make contributions to a multi-employer pension plan sponsored and administered by a group of trustees. The contract expired in August, 1984, and was not renewed.[1]

When the contract expired, Williams Meat was considered, under the Employee Retirement Security Act (ERISA), *see* 29 U.S.C. §§ 1001-1461, to have withdrawn completely from the multi-employer pension plan. *See* 29 U.S.C. §§ 1383(a)(1). That withdrawal triggered liability on the part of Williams Meat for a final payment to the pension plan to cover certain unfunded vested benefits. *See* 29 U.S.C. § 1381(a), § 1383(e). The amount of the assessment is determined by statute. *See* 29 U.S.C. § 1381(b)(1), § 1391.

In early 1987, Williams Meat filed for reorganization under the bankruptcy laws; in late summer, 1987, the reorganization petition was converted into one for liquidation. In January, 1988, the pension plan trustees made a claim in the bankruptcy proceeding for the withdrawal liability assessment due under ERISA.

In June, 1988, the pension plan trustees demanded payment of the withdrawal liability assessment from SLC

---

[1] The Teamsters had struck Williams Meat, and most of the meatcutters apparently refused to cross the Teamsters picket line. In that environment, negotiations for a new contract with the union representing the meatcutters broke down and were never resumed.

and the Franklin Investment Group. These demands were sent to Ronald Sexton in his capacity as representative of those corporations. In March, 1989, the pension plan trustees sued in federal district court for payment of the withdrawal liability assessment; the defendants named were SLC, the Franklin Investment Group, Ronald Sexton individually, and the Sexton Family Trust, a revocable trust established in 1980 by Mr. Sexton and as to which he is the grantor, a trustee, and a beneficiary. By May, 1990, several other corporate entities associated with Mr. Sexton had been added as defendants. In July, 1991, the trial court[2] granted summary judgment to the pension plan trustees against all defendants. In August, 1991, the clerk entered judgment for the plaintiffs in accordance with the trial court's ruling. The defendants appeal from that judgment.

There are four issues on appeal – whether the defendants have waived a defense of laches against the pension plan trustees by failing to request arbitration of that issue; whether the Sexton Family Trust may be held liable as a trade or business, as defined by ERISA, under the control of Ronald Sexton; whether Ronald Sexton individually may be held liable; and whether the pension plan trustees are barred from pursuing the suit because of a settlement agreement allegedly reached between them and the defendants. We affirm the trial court as to all issues.

---

[2] The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

I.

"As soon as practicable after an employer's complete . . . withdrawal" from a multi-employer pension plan, the plan sponsor "shall" notify the employer of the amount of the withdrawal liability assessment sought, submit to the employer a schedule for payment, and demand from the employer "payment in accordance with the schedule." *See* 29 U.S.C. § 1399(b)(1). To challenge a determination of amount due, the employer must request a review from the plan sponsor; that review must be requested within 90 days of the employer's receipt of the notice of the determination. *See* 29 U.S.C. § 1399(b)(2)(a). After "a reasonable review," the plan sponsor "shall" notify the employer of the decision reached. *See* 29 U.S.C. § 1399(b)(2)(B).

"Any dispute between an employer and the plan sponsor . . . concerning a determination" made under 29 U.S.C. §§ 1381-1399 "shall be resolved through arbitration." *See* 29 U.S.C. § 1401(a)(1). Either party may initiate arbitration proceedings within 180 days of an employer's timely request to the plan sponsor for a review of the determination of amount due or within 60 days of the plan sponsor's notification to the employer of its decision after such review, whichever is earlier. *See* 29 U.S.C. § 1401(a)(1). Judicial review of a determination reached through arbitration may be sought within 30 days of the arbitration award. *See* 29 U.S.C. § 1401(b)(2). If neither party seeks arbitration, the withdrawal liability assessment becomes due according to the schedule devised by the plan sponsor, who may sue for collection under that schedule. *See* 29 U.S.C. § 1401(b)(1).

In this case, notice and the demand for payment of the withdrawal liability assessment were not proffered to the defendants until June, 1988, almost four years after liability for the assessment was triggered. Even the claim in the Williams Meat bankruptcy proceeding was not made until January, 1988, over three years after liability was triggered. The defendants contended in the trial court that this delay prejudiced them; they pleaded laches as a defense to the suit. The trial court held, however, that because the defendants had never requested arbitration, they had waived their right to assert laches as a defense to payment. The first issue on appeal, then, is whether the trial court was correct in that holding.

The defendants argue that the question of unreasonable delay is one requiring statutory interpretation and is therefore not suitable for resolution by an arbitrator rather than a court. They also argue that the purpose of the arbitration requirement is to resolve disputes as to the amount claimed or the method used in calculating the amount and that the dispute in this case involves neither of those issues. The pension plan trustees argue that the essence of the laches claim – that the trustees did not notify the defendants "[a]s soon as practicable," *see* 29 U.S.C. § 1399(b)(1), after the withdrawal of Williams Meat from the multi-employer pension plan – is a factual dispute and therefore within the purview of matters amenable to resolution by an arbitrator. They also argue that this defense was available to the defendants by the time arbitration had to be requested and that the defendants therefore have no good excuse for not seeking arbitration on that point. We agree with the pension plan trustees and affirm the trial court on this issue.

The courts holding that all defenses are barred if not initially arbitrated cite several reasons for so ruling – the congressional preference for a nonjudicial, possibly speedier resolution for disputes, as reflected by the establishment of an arbitration scheme; the fact that 29 U.S.C. § 1401 declares that "[a]ny dispute" concerning a determination related to a withdrawal liability assessment is to be arbitrated; the arbitrator's likely expertise in pension matters; the consideration that factual questions are especially amenable to resolution by an arbitrator; and the promotion of judicial economy and efficient use of judicial resources by the potential for resolution of most issues outside the court system. *See. e.g., Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056-57 (7th Cir. 1988), and *Teamsters Pension Trust Fund v. Allyn Transportation Co.*, 832 F.2d 502, 504-06, 505 n.4 (9th Cir. 1987).

Even the cases allowing certain defenses to bypass arbitration state that the existence of a question of statutory interpretation is not, by itself, sufficient to eliminate the arbitration requirement and that factual issues must always be arbitrated. *See, e.g., Mason and Dixon Tank Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 852 F.2d 156, 164 (6th Cir. 1988); *New York State Teamsters Conference Pension and Retirement Fund v. McNicholas Transportation Co.*, 848 F.2d 20, 22-23 (2d Cir. 1988); *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1254-55 (3d Cir. 1987); *I.A.M. National Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 416-18, 422, 428 n.23, 429 (D.C. Cir. 1987); and *Republic Industries. Inc. v. Teamsters Joint Council No. 83*, 718 F.2d 628, 634-35 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

One appellate court has held that defenses not going to the merits of the actual assessment need not be arbitrated. *See In re Centric Corp.*, 901 F.2d 1514, 1518 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 145 (1990). That court described a claim that a pension plan's trustees brought a suit so late as to prejudice the employer as such a defense and characterized it as based on laches. *Id.*; *see also Trustees of Colorado Pipe Industry Pension Trust v. Howard Electrical and Mechanical, Inc.*, 909 F.2d 1379, 1386 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 958 (1991). In the case at bar, however, the alleged delay at issue was the pension plan trustees, submission of notice and demand for payment to the defendants, not any delay in bringing suit.

As far as we can tell, only one court has specifically considered whether arbitration is required when an employer claims that notice from pension plan trustees was not made "[a]s soon as practicable," *see* 29 U.S.C. § 1399(b)(1). In that case, the court held that a defense of laches based on that provision was waived if not arbitrated. *See ILGWU National Retirement Fund v. Smart Modes of California, Inc.*, 735 F. Supp. 103, 106-07 (S.D. N.Y. 1990); *see also Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1127 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989).

We believe that the question of whether the pension plan trustees' delay was unreasonable is a factual one that could have been raised by the defendants at the time they could have requested arbitration. We hold, accordingly, that by their failure to request arbitration they have waived it as a defense to payment. We therefore affirm the trial court as to this issue.

II.

"[A]ll employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer." *See* 29 U.S.C. § 1301(b)(1). Liability for withdrawal assessments is joint and several as to all such trades and businesses. *See, e.g., Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 120-21 (4th Cir. 1991), and *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *see also Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 893-95 (9th Cir. 1988).

The statutes do not define "trade or business." The courts considering that phrase "have engaged in an essentially factual inquiry" to determine whether a particular entity should be considered a trade or business for purposes of ERISA. *Lafrenz*, 837 F.2d at 894 n.6.

The trial court in this case, on motion for summary judgment, held that no genuine issue of material fact existed on the question of whether the Sexton Family Trust was a trade or business under the control of Ronald Sexton. The defendants apparently do not contest the finding of Mr. Sexton's control over the trust.[3] They do, however, dispute that the trust is a trade or business, arguing that its primary purpose was not to generate

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[3] Of course, for the trust to be jointly liable with SLC and the Franklin Investment Group, all three entities have to be under the common control of Ronald Sexton. The defendants, however, apparently do not contest that issue either.

income or profit but instead to assist in Mr. Sexton's estate planning arrangements. The defendants also argue that its income-generating activities were not continuous or regular enough to amount to the acts of a trade or business and that, in any event, those activities had not taken place at the time the liability for the withdrawal assessment arose. They argue, thus, that the trial court's grant of summary judgment as to that issue was incorrect. At the very least, they contend, a genuine issue of material fact still exists on the question.

The pension plan trustees argue that summary judgment was appropriate on the question of whether the trust's activities make it a trade or business. They further argue that the defendants failed to raise in the trial court the issue of when the trust may have become a trade or business and are thus barred from raising it now. We agree with the pension plan trustees and affirm the trial court on this issue.

The cases interpreting the meaning of "trade or business" under ERISA have held the following fact patterns to have established the existence of a trade or business liable under the law: vehicle leasing operations conducted for profit; vehicle and real property leases between two entities under common control; and the subsistence of one commonly controlled entity, directly or indirectly, partly or entirely, upon the revenues generated by a second commonly controlled entity. *See. e.g., Lafrenz*, 837 F.2d at 894-95; *Trustees of the Amalgamated Insurance Fund v. Saltz*, 760 F. Supp. 55, 57-58 (S.D. N.Y. 1991); *Central States, Southeast and Southwest Areas Pension Fund v. Sztanyo Trust*, 693 F. Supp. 531, 537-38 (E.D. Mich. 1988); *Central States, Southeast and Southwest Areas Pension*

Fund v. Bay, 684 F. Supp. 483, 485 (E.D. Mich. 1988); *Central States, Southeast and Southwest Areas Pension Fund v. Skyland Leasing Co.*, 691 F. Supp. 6, 12 (W.D. Mich. 1987), *aff'd without opinion*, 892 F.2d 1043 (6th Cir. 1990); *Central States, Southeast and Southwest Areas Pension Fund v. Long*, 687 F. Supp. 298, 301 (E.D. Mich. 1987); *United Food and Commercial Workers Union v. Progressive Supermarkets*, 644 F. Supp. 633, 639 (D. N.J. 1986); and *Pension Benefit Guaranty Corp. v. Center City Motors, Inc.*, 609 F. Supp. 409, 412 (S.D. Cal. 1984). In this case, it is undisputed that the trust, established in 1980, had leased real property in 1986 and 1987 to Williams Meat and SLC. Without addressing the question of when those activities occurred, the trial court held that such undisputed facts established the existence of a trade or business for ERISA purposes. If the question of the timing of the trust's activities is not a consideration, we agree with that legal conclusion.

We must determine, then, whether the issue of when the trust became a trade or business was raised in the trial court. If it was not, the defendants are barred from raising it on appeal. *See, e.g.*, 10 C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure: Civil* 2d § 2716 at 651-54 (1983).

We have examined the defendants' response to the plaintiffs' motion for summary judgment on count one, the defendants' motion for and reply brief in support of reconsideration of the trial court's order granting summary judgment to the plaintiffs on count one, the defendants' own motion for summary judgment, and the defendants' response to the plaintiffs' motion for summary judgment on count two. To the extent that those

documents address the problem of whether the trust was a trade or business, they do so only in the context of the purpose and nature of the trust's activities; nowhere is there any argument relating to the timing of the trust's activities. We hold, therefore, that the defendants may not raise this issue now. Accordingly, we affirm the trial court's entry of summary judgment against the trust.

III.

In the original and successive complaints, the pension plan trustees pleaded that Ronald Sexton was personally liable for the withdrawal assessment because he controlled Williams Meat, SLC, the Franklin Investment Group, and the Sexton Family Trust in such a way as to make them alter egos of himself. The trial court, on motion for summary judgment, declined to address the alter ego question as to any of the corporate defendants and held, as to the trust, that because it was an unincorporated trade or business that Mr. Sexton controlled, he was personally liable under the statute for any withdrawal assessment for which the trust was liable. The defendants contend on appeal that Mr. Sexton cannot be held personally liable for the withdrawal assessment against either the trust or the corporate defendants.

As noted earlier, liability for withdrawal assessments is joint and several among all trades and businesses under common control. *See, e.g., Teamsters Joint Council No. 83 v. Centra, Inc.*, 947 F.2d 115, 120-21 (4th Cir. 1991), and *Pension Benefit Guaranty Corp. v. Ouimet Corp.*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981); *see also Board of Trustees of Western Conference of Teamsters*

Pension Trust Fund v. Lafrenz, 837 F.2d 892, 893-95 (9th Cir. 1988). We have already found that the trust is liable for the withdrawal assessment obligations of the corporate defendants by virtue of the fact that both it and the corporate defendants are trades and businesses under the common control of Mr. Sexton. The question, then, is whether Mr. Sexton himself may be held personally liable for those obligations, and, if so, under what circumstances. We find for the pension plan trustees on this issue, although for slightly different reasons from those argued.

In both their motion for and their reply brief in support of reconsideration of the trial court's order granting summary judgment to the plaintiffs on count one, the defendants described the trust as an alter ego of Mr. Sexton. The effect of this concession, in our view, is that Mr. Sexton may be held personally liable for the obligations of the trust.

The concept of personal liability for the obligations of an entity considered to be an alter ego of an individual is frequently employed in relation to corporations. *See, e.g.*, H. Henn and J. Alexander, *Laws of Corporations and Other Business Enterprises* § 146 at 351 (3d ed. 1983), and 18 Am. Jur. 2d *Corporations* § 45 at 844-46 (1985); *see also Rockney v. Blohorn*, 877 F.2d 637, 643 (8th Cir. 1989); *Connors v. P&M Coal Co.*, 801 F.2d 1373, 1378 (D.C. Cir. 1986); and Annotation, *What Constitutes "Employer" for Purposes of Employer's Withdrawal Liability under Multiemployer Pension Plan Amendments Act of 1980*, 95 A.L.R. Fed. 703, especially § 4 at 714-20 (1989). We see no reason why the alter ego concept should not have the same effect in the case of a trust. We therefore affirm the trial court on its

holding that Mr. Sexton is personally liable for the withdrawal liability assessment in this case.[4]

IV.

Numerous settlement discussions took place between the parties in the summer of 1989. In September, 1989, the defendants proffered a check for $60,000 to the pension plan trustees. That check was refused. The defendants then moved for enforcement of a settlement agreement

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[4] We believe that it is clear, under ordinary circumstances, that Mr. Sexton could not be held personally liable for the obligations of the corporate defendants without a finding that those corporations are his alter egos. The appellate courts considering this question have held that a controlling stockholder or officer of a corporation that is liable for a withdrawal assessment is not individually liable for the assessment unless the corporation is found to be an alter ego of that controlling officer or stockholder. *See, e.g., Scarbrough v. Perez*, 870 F.2d 1079, 1084 (6th Cir. 1989); *De Breceni v. Graf Brothers Leasing, Inc.*, 828 F.2d 877, 879-81 (1st Cir. 1987), *cert. denied*, 484 U.S. 1064 (1988); and *Connors v. P&M Coal Co.*, 801 F.2d 1377-78 (D.C. Cir. 1986); *see generally* Annotation, *What Constitutes "Employer" for Purposes of Employer's Withdrawal Liability under Multiemployer Pension Plan Amendments Act of 1980*, 95 A.L.R. Fed. 703, especially § 4 at 714-20 (1989). *See also Rockney v. Blohorn*, 877 F.2d 637, 641-43 (8th Cir. 1989), and *Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan v. Hroch*, 757 F.2d 184, 190-91 (8th Cir. 1985).

In this case, however, Mr. Sexton's personal liability is predicated not on his status as controlling stockholder or officer of the corporate defendants but because of his role in relation to the trust, which itself is jointly and severally liable for the withdrawal assessment obligations of the corporate defendants. *See generally* Annotation, *What Constitutes "Employer"*, 95 A.L.R. Fed. 703, especially § 9(a) at 727-31.

that they contended had been accepted by all parties. The trial court denied the motion even before the pension plan trustees responded.

In the order relating to its conclusion about the settlement agreement, the trial court stated that it had reviewed the various documents submitted by the defendants and had concluded that "no settlement offer made by plaintiffs was timely accepted by defendants." In a later order, the trial court declined to vacate that initial order; in a third order, the trial court denied discovery requests of the defendants relating to the settlement negotiations on the grounds that settlement was no longer an issue.

On appeal, the defendants submit the documents originally offered to the trial court and argue that those documents are uncontroverted and demonstrate as a matter of law that one of the settlement offers made by the pension plan trustees was indeed accepted by the defendants. They argue that the trial court's conclusion that no settlement agreement had been reached was wrong. At the very least, they argue, they are entitled to a hearing to present additional evidence on the issue. We disagree as to both arguments and affirm the trial court's finding that no settlement was reached.

We have examined the defendants' motion to enforce the alleged settlement agreement, the two briefs submitted in support of it, and the defendants' letter to the trial court citing additional authority for the motion. None of those documents contains any request for an evidentiary hearing or even the suggestion that the submission of additional evidence, beyond that accompanying the

motion, would be necessary or helpful. The trial court entered its order denying the motion on September 19, 1989. It was not until a month later, on October 20, 1989, that the defendants moved to vacate that order and requested an evidentiary hearing. It was not until November 16, 1989, in their reply to the pension plan trustees, response to the defendants' motion to vacate, that the defendants even described the testimonial evidence that they might present at a hearing. Under these circumstances, we hold that the trial court was well within its discretion to act on the original motion without giving the defendants an evidentiary hearing. *See* Fed. R. Civ. P. 43(e). We turn, then, to the merits of the trial court's ruling.

On September 6, 1989, the pension plan trustees offered three settlement proposals to the defendants; the deadline for responding to or accepting one of the alternatives was 5:00 p.m. on September 7, 1989. The defendants contend that during a telephone conversation between Mr. Sexton and counsel for the pension plan trustees before the deadline, the attorney agreed to explore the possibility of a fourth alternative suggested by Mr. Sexton. The defendants further contend that the attorney also agreed to leave the offer open as to the three previous alternatives, at least until a decision had been reached on the fourth proposal. In reliance upon that agreement, the defendants contend, they did not take further action on the three initial proposals until after the pension plan trustees had rejected the fourth, which was on September 8, 1989, one day after the deadline originally given by the pension plan trustees. When the defendants then attempted to proffer a check reflecting their

acceptance of one of the three initial proposals, counsel for the pension plan trustees refused to accept it. The defendants' motion is accompanied by various correspondence between the parties and an affidavit from Mr. Sexton in transcript-like form containing "his [best] recollection" of the conversation between him and the attorney.

The essence of the defendants' argument is that because they delayed a decision on the first three alternatives in reliance upon the statement of counsel for the pension plan trustees that the deadline for all offers was extended through September 8, 1989, the pension plan trustees are now estopped to reject the defendants' proffer based on one of the initial proposals. The pension plan trustees argue, in response, that Mr. Sexton's suggestion of a fourth alternative acted as a counteroffer that extinguished the offer of the first three alternatives; implicit in this argument is the contention that no extension of the original deadline was given by counsel for the pension plan trustees.

Correspondence from counsel for the pension plan trustees, submitted in support of the defendants' motion, reflects that as of September 6, 1989, the pension plan trustees offered three alternatives to the defendants – payment of $62,500 in a lump sum by cashier's check,[5] over time with security in the form of a surety bond, and over time with security in the form of a letter of credit. A

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[5] The documents accompanying the defendants' motion specify a lump-sum payment of $60,000. These documents apparently were also enclosed with the attorney's letter, although that is not absolutely clear from the record.

letter from counsel for the pension plan trustees dated September 8, 1989, also submitted with the defendants' motion, asserts that Mr. Sexton had rejected the pension plan trustees' original offers and had counteroffered "a lower amount." That letter also states that the pension plan trustees had rejected the counteroffer and declined to renew their previous offer of $62,500.

The trial court found that "no settlement offer made by plaintiffs was timely accepted by defendants." This finding by the trial court is a factual one. *See. e.g., Glass v. Rock Island Refining Corp.*, 788 F.2d 450, 455 (7th Cir. 1986). As such, it is not to be set aside "unless clearly erroneous." *See* Fed. R. Civ. P. 52(a). In making that determination, we must construe the evidence "in a light most favorable to the appellee." *United Barge Co. v. Notre Dame Fleeting and Towing Service, Inc.*, 568 F.2d 599, 602 (8th Cir. 1978). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety," the trial court's finding of fact is to be upheld. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence." *Id.* at 574. After reviewing the evidence submitted with the defendants' motion to enforce the alleged settlement agreement, we hold that the trial court's finding that no settlement was reached is not clearly erroneous. We therefore affirm the trial court as to this issue.

V.

For the reasons stated, we affirm the judgment of the trial court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MICHAEL P. VAUGHN, et al., Plaintiffs,	)	
vs.	)	No. 89-0211-CV-W-5
RONALD E. SEXTON, et al., Defendants.	)	(Filed Dec. 5, 1989)

ORDER

On motion of plaintiffs, and for good cause shown, plaintiffs having made notice and demand and accelerated their demand for withdrawal liability, defendants having failed to make any payment with regard to such withdrawal liability, and interim payment of withdrawal liability pending the outcome of this litigation in addition to other sums being mandated by pertinent provisions of the Employee Retirement Income Security Act, as amended by the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1001 *et seq.*, in particular Section 4219(c), 29 U.S.C. § 1399(c) (2) and (5), and Section 502(g) (2), 29 U.S.C. § 1132(g)(2), it is hereby

ORDERED that:

1. Plaintiffs' motion for partial summary judgment on Count I of plaintiffs' Amended Complaint is granted.

2. Judgment shall be entered in favor of plaintiffs and against defendants on Count I of plaintiffs' Amended Complaint.

3. Defendants, jointly and severally, shall *pay* over to plaintiffs' Plan $249,652.00 as an interim payment of the entire amount of withdrawal liability claimed by plaintiffs pending the outcome of this litigation, plus interest, additional interest or liquidated damages, and attorneys' fees and expenses incurred to date of payment.

4. Plaintiffs shall submit to this Court within ten (10) days after the date of this Order the exact amount of all sums not above set out.

5. The withdrawal liability sum above set out shall be paid over to plaintiffs on or before December 20, 1989, without regard to any further sums to be paid over after plaintiffs' submission of the exact amount of all other sums to this Court.

6. This Court retains jurisdiction pending compliance with this and any related order.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

December 5, 1989.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MICHAEL P. VAUGHN, et al., Plaintiffs,	)	No. 89-0211-CV-W-5
vs.	)	
RONALD E. SEXTON, et al., Defendants.	)	(Filed Dec. 8, 1989)

ORDER

Before this Court is defendants' motion to compel discovery. Plaintiffs object and refuse to answer interrogatories numbered 4 through 20 and 23 through 28. Plaintiffs object and refuse to answer interrogatories 23 through 27 because they deal with an offer of settlement which this Court has ruled was not timely accepted. As to the remaining interrogatories mentioned above, plaintiffs object and refuse to answer because defendants have waived defenses to plaintiffs' claims by failing to request arbitration. Plaintiffs have refused to answer a number of defendants' requests for documents and requests for admissions on the same grounds. For the following reasons, defendants' motion to compel discovery is denied.

By order dated November 30, 1989, this Court denied defendants' motion to vacate this Court's order denying defendants' motion to compel plaintiffs to comply with the settlement contract. In this Court's order of September 19, 1989, denying defendants' motion to compel plaintiffs to comply with the settlement contract, this Court found that defendants had not timely accepted

plaintiffs' offer of settlement. As such, settlement is not at issue in this case. Because settlement is not an issue, defendants' discovery requests directed toward this subject are outside the scope of permitted discovery. Fed. R. Civ. P. 26.

The remaining discovery requests for which defendants seek this Court's order compelling discovery have been resisted by plaintiffs on the grounds that defendants have waived all defenses to withdrawal liability by failing to timely request arbitration. To fully understand this objection asserted by plaintiffs, a brief review of the material facts of this suit needs be set forth.

The Meat Cutters Local 576 and Employers Kansas and Missouri Pension Plan ("Plan") filed a claim for withdrawal liability against Williams Meat Company ("Williams"), a debtor in Chapter 11 converted to Chapter 7 bankruptcy. The Plan also sent notice dated June 15, 1988, to Ronald E. Sexton ("Sexton") of Franklin Investment Group, Ltd. ("Franklin") informing him that the Plan had assessed withdrawal liability for the withdrawal of Williams from the Plan. The same notice dated June 15, 1988, was sent to Sexton of SLC of North America, Inc. ("SLC").

The plan sent separate notices dated August 31, 1988, to Sexton of Franklin and to Franklin of SLC stating that default on the amount of withdrawal liability assessed would occur sixty days after receipt of this notice if required withdrawal liability payments were not made.

At no time, before or after default occurred, did Sexton, Franklin, SLC or any of the defendants named in

this action request that the Plan's assessment of withdrawal liability be arbitrated.

On March 3, 1989, the named plaintiff trustees of the Plan filed the instant suit for the collection of the entire amount of withdrawal liability due to the Plan. The named corporate and trust defendants in this suit are alleged to be jointly and severally liable as control group members under the Employee Retirement Income Security Act ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1301(b)(1). Defendant Sexton is allegedly liable for the assessed withdrawal liability under an "alter ego" or "piercing the corporate veil" theory.

As a defense to plaintiffs' suit to collect withdrawal liability, defendants allege that they are not "employers" within the meaning of MPPAA. As noted above, plaintiffs are resisting discovery requests directed at obtaining evidence on this issue claiming that defendants have waived this defense by not requesting arbitration within the statutorily allotted time period. 29 U.S.C. § 1401(a)(1). It is undisputed that defendants have not timely requested arbitration of the Plan's assessment of withdrawal liability.

In support of their motion to compel discovery, defendants assert that the issue of "employer" status is not mandatorily arbitrable under the MPPAA because it is a legal question of statutory interpretation to be decided by the courts and not by an arbitrator.

Plaintiffs argue in opposition to defendants' motion to compel discovery that any defense by an employer or a control group member as to the existence or amount of

assessed withdrawal liability is waived if the employer or control group member does not timely request arbitration on that matter.

This Court can find no binding precedent to guide its determination on this issue. For the following reasons, this Court concludes that plaintiffs' view of the law on this issue is correct.

In pertinent part, 29 U.S.C. § 1401 states as follows:

> (a)(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. . . .
>
> * * *
>
> (b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.
>
> (2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.
>
> (3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner,

> subject to the same limitations, carried out with the same powers (including subpoena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

On its face, 29 U.S.C. § 1401(a)(1) appears to require that each and all objections an employer has to a multiemployer pension plan's determinations must be first resolved by arbitration. Such an interpretation is bolstered by § 1401(b)(1) which makes a multiemployer pension plan's demand immediately due and owing if no arbitration is initiated within the statutory time limit.

Such a plain reading of this statute has been rejected by some circuit courts. The Third Circuit, for example, has held that "arbitration may be bypassed when the district court faces only questions of statutory interpretation." *Dorn's Transp., Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897, 903 (3rd Cir. 1986). The Third Circuit later emphasized the extreme narrowness of *Dorn's*, and concluded that, in light of the clear statutory directive of § 1401, an employer may not avoid arbitration by merely stylizing disputed issues as ones of purely statutory interpretation. *Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1255 (3rd Cir. 1897).

The Second Circuit has also concluded that, under narrow circumstances, arbitration may not be mandatory. Where, for instance, the case presents only legal questions of statutory interpretation, the parties all agree that arbitration is not required, the suit was filed prior to the arbitration request time limit, and judicial economy would not be served by remanding the case for arbitration, failure to request arbitration will not bar a district court's determination that arbitration may be bypassed.

Park South Hotel Corp. v. New York Hotel Trades Council, 851 F.2d 578, 583 (2nd Cir. 1988).

Even more supportive of defendants' position, the Sixth Circuit has determined that there exists yet another narrow exception to the requirement of arbitration. Where a district court is asked to decade in the first instance whether an alleged employer is indeed an "employer" within the meaning of § 1401(a)(1), arbitration is not required on this issue. *Mason and Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 852 F.2d 156, 167 (6th Cir. 1988). The Sixth Circuit reasoned that "[s]ince only an "employer" is required to arbitrate, the district court may address this threshold question before arbitration." *Id.*

While the reasoning in these and other cases holding that arbitration is not mandatory under § 1401(a)(1) has some merit, this Court concludes that the better reasoned approach interprets § 1401(a)(1) to require arbitration in the first instance of all disputes concerning a multiemployer pension plan's determination of withdrawal liability. Such a rule, of course, does not foreclose a federal court challenge to the constitutionality of the statutory requirements of ERISA as amended by MPPAA. It does, however, require that an employer, or alleged employer, submit any disputes concerning determinations made by multiemployer pension plans under sections 1381 through 1399 of the MPPAA to an arbitrator before proceeding to the federal courts.

This Court's conclusion, that failure to request arbitration does waive an employer's defenses to withdrawal liability in federal court, is significantly influenced by the

opinion of Chief Judge Grady in *Robbins v. Chipman Trucking Inc.*, 693 F. Supp. 628 (N.D. Ill. 1986), *aff'd*, 866 F.2d 899 (7th Cir. 1988). Chipman Trucking, as in the instant case, asserted as a defense to MPPAA withdrawal liability its contention that it was not an employer within the meaning of the MPPAA. The court rejected Chipman Trucking's defense on the grounds that it was waived by failure of Chipman Trucking to timely request arbitration of that issue.

After reviewing the MPPAA statutory scheme, *Robbins* provides an extensive compilation of cases which hold that failure to arbitrate under the MPPAA is an absolute bar to contesting withdrawal liability in federal courts. *Robbins*, 693 F. Supp. at 631, n.2. It then goes on to discuss the rationales of these decisions. *Robbins*, 693 F. Supp. at 631-633. Among these mentioned are the broad coverage of § 1401, the difficulty of determining whether the issue is one of law or fact, and the clear congressional intent that such disputes be resolved by arbitration. *Id.*

Following this is a similar section compiling and analyzing those cases which hold that failure to arbitrate under the MPPAA is not an absolute bar to a federal court's hearing of withdrawal liability defenses. *Robbins*, 693 F. Supp. at 633-635. In many of these cases, arbitration was still available to the parties. The court noted that the question before these courts was "whether arbitrable issues before the court should be decided or referred back to arbitration, not whether failure to seek arbitration waived the right to raise the defenses in court."

A second group of cases in this category dealt with facial challenges to the constitutionality of the MPPAA.

Courts considering these constitutional claims did not require arbitration because arbitration could neither moot these issues or develop a better record for their resolution. *Robbins,* 693 F. Supp. at 634.

Finally, the last group of cases simply concluded that arbitration is not mandatory where the issues to be decided require only statutory interpretation. *Robbins,* 693 F. Supp. at 634-35.

In adopting the waiver view, Chief Judge Grady concludes that the "statutory interpretation" exception is not a sufficient reason to excuse arbitration in face of the strong congressional preference for arbitration under the MPPAA, the promotion of judicial economy, and the frequently blurred line between legal and factual questions. *Robbins,* 693 F. Supp. at 635-639.

For the reasons stated in *Robbins,* this Court too concludes that "[t]he purposes of the arbitration requirement [of the MPPAA] are best served by the parties resorting first to arbitration, even where one of the parties believes the issues are limited to statutory interpretation." *Robbins,* 693 F. Supp. at 639. Failure to initiate arbitration within the required statutory time limit will result in the waiver of an employer's right to assert defenses to the determined withdrawal liability. Id.

In affirming *Robbins,* the Seventh Circuit concluded that "Congress' directive [regarding the MPPAA] is clear. *Any* dispute over withdrawal liability as determined under the enumerated statutory provisions *shall* be arbitrated." *Robbins v. Chipman Trucking, Inc.,* 866 F.2d 899, 902 (7th Cir. 1988) (citation omitted) (emphasis in original). "The district court's determination that [employer]

Chipman's request for arbitration was not timely means that it has waived any defenses it may have raised." *Id.*

Chief Judge Grady and the Seventh Circuit are not alone in this conclusion. For much the same reasons expressed in *Robbins*, both the District of Columbia Circuit, *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (1987), and the Ninth Circuit, *Teamsters Pension Trust Fund v. Allyn Transp. Co.*, 832 F.2d 502 (1987), have concluded that there are no exceptions to the MPPAA requirement that all disputes over multiemployer pension plan determinations of withdrawal liability be submitted in the first instance to arbitration.

A conclusion that the "statutory interpretation" exception does not apply to the MPPAA is further bolstered by subsection (b)(3) of § 1401. This paragraph, as noted above, requires that arbitration under § 1401 be "carried out with the same powers . . . as an arbitration proceeding carried out under Title 9." 29 U.S.C. § 1401(b)(3).

The Federal Arbitration Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The United States Supreme Court has recently concluded that "[t]he Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims." *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 2337 (1987); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985); *Rodriequez De Quijas v. Shearson/American Exp.*,

Inc., ___ U.S. ___, 109 S.Ct. 1917 (1989) (overruling *Wilko v. Swan* 346 U.S. 427, 74 S.Ct. 182 (1953)).

To defeat application of the Arbitration Act, a party "must demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under [other statutory schemes]. . . . " *McMahon*, 107 S.Ct. at 2338; *see Arnulofo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (8th Cir. 1988) (No congressional intent to except application of Arbitration Act for ERISA claims). Congress clearly did not intend that the Arbitration Act not apply to disputes over withdrawal liability under the MPPAA. That Congress expressly provided for the application of the Arbitration Act via § 1401(b)(3) to arbitration proceedings under § 1401(a) evidences an intent quite to the contrary.

The Arbitration Act in and of itself only applies to, and makes mandatory the enforcement of, private contractual agreements to arbitrate. Through 29 U.S.C. § 1401(b)(3), however, Congress has provided that the Arbitration Act applies not only to private contractual agreements to arbitrate claims, but also to all disputes over multiemployer pension plan determinations of withdrawal liability. Section 1401(b)(3), in essence, incorporates the provisions of the Arbitration Act into the MPPAA. In doing so, it also necessarily incorporates judicial constructions of the Arbitration Act. As noted above, the Arbitration Act mandates enforcement of arbitration even where the issues require statutory interpretation only. *McMahon, supra*. Even were this Court otherwise persuaded that the "statutory interpretation" exception to mandatory arbitration should apply to the MPPAA, § 1401(b)(3) and the Supreme Court's recent decision in

McMahon require that such an exception not be found to apply to the MPPAA.

This Court, therefore, holds that failure to timely request arbitration of a multiemployer pension plan's determinations under sections 1381 through 1399 of the MPPAA bars the assertion of *any* defenses to such determination in federal court. Defendants in the instant case did not timely request arbitration under § 1401(a) of the MPPAA. Their asserted defense in federal court, that they are not "employers" within the meaning of the MPPAA, is thus waived.

As such, discovery requests which seek evidence relevant to the issue of whether or not defendants are "employers" within the meaning of the MPPAA are outside the scope of permissible discovery. Fed. R. Civ. P. 26. Plaintiff's objections to such requests on the grounds that defendants' defenses to withdrawal liability have been waived are proper. It is therefore

ORDERED that defendants' motion to compel discovery is denied.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

December 8, 1989

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MICHAEL P. VAUGHN, et al., Plaintiff, vs. RONALD E. SEXTON, et al., Defendant.	)	No. 89-0211-CV-W-5 (Filed Jan. 18, 1990)

ORDER

Before this Court is defendants' motion for reconsideration of the Court's orders denying discovery to defendants and granting partial summary judgment to plaintiffs. Defendants' motion for reconsideration concerns two separate orders issued by this Court, the order of December 5, 1989, and the order of December 8, 1989. Because these orders involve distinct issues, this Court will address defendants' motion for reconsideration of each order separately.

Order of December 5, 1989

This Court's order of December 5, 1989, granted plaintiffs' motion for partial summary judgment. Plaintiffs sought summary judgment on Count I of its amended complaint. Count I essentially alleges that plaintiffs (1) properly determined withdrawal liability of defendants, (2) properly notified defendants, as members of "the Controlled Group" of plaintiffs' determination of withdrawal liability, and (3) did not receive any of the

demanded payments of withdrawal liability within the statutory time limit.

In opposing plaintiffs' motion for partial summary judgment, defendants alleged a number of substantive defenses to their liability for withdrawal payments. Included were allegations that some defendants were not notified of the assessment of withdrawal liability against them and that they were not employers as defined by the applicable statutes.

In their suggestions for reconsideration, defendants argue that this Court's grant of plaintiffs' motion for partial summary judgment "should be set aside because (a) plaintiffs filed a claim in the bankruptcy court before the period for initiating arbitration had expired, which has equitably of [sic] tolled the date on which defendants must initiate arbitration; (b) defendants have reason to believe that the labor agreement on which plaintiffs base their withdrawal liability claims was not in effect at the time defendant SLC acquired the stock of Williams Meat Company; (c) defendant Ronald E. Sexton was not notified in his individual capacity and in his capacities as trustee of the Sexton Family Trust and statutory trustee of Kalco, Inc. of any withdrawal liability in these capacities under the MPPAA on behalf of Williams; (d) defendants deny that they were 'employers' which subjected them to liability under ERISA; and (e) notice of the withdrawal liability was not given in a timely fashion."

While this Court understands the severity of many of the provisions of MPPAA, it concludes that the reasons asserted in defendants' motion for reconsideration do not

require that this Court set aside its order granting partial summary judgment.

MPPAA clearly requires that an employer against whom withdrawal liability has been assessed make payments pending resolution of *any* disputes. 29 U.S.C. §§ 1399(c)(2), 1399(c)(5), 1401(b)(1), 1401(d). The majority of courts deciding this issue have interpreted MPPAA in this manner. *See* Plaintiffs' Suggestions in Support of Their Motion for Partial Summary Judgment, pp. 8-11. While this Court may exercise a degree of discretion in reviewing interim withdrawal liability motions, it must keep in mind the clear congressional intent that withdrawal liability be paid first and disputed issues resolved later. *Robbins v. Lady Baltimore Foods. Inc.*, 868 F.2d 258, 265 (7th Cir. 1989). This Court also places significant weight on one of Congress' primary purposes in enacting the MPPAA: the protection of beneficiaries of multiemployer pension plans. *See ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks. Inc.*, 846 F.2d Cir. 879, 880-82 (1988).

Finding no appropriate reason to deny plaintiffs' motion for partial summary judgment requiring payment of interim withdrawal liability, defendants' motion for reconsideration of this Court's order of December 5, 1989, will be denied insofar as it seeks that the order be set aside. For reasons stated in the discussion of this Court's order of December 8, 1989, however, this order will be modified to permit defendants to post bond in lieu of interim withdrawal liability payment to plaintiffs.

Order of December 8, 1989

By order of December 8, 1989, this Court, well aware of a split in the circuit courts on this issue, adopted the rule that an employer which fails to timely pursue arbitration of an assessment of withdrawal liability under MPPAA waives any defenses it might have asserted in arbitration when pension plan trustees seek enforcement of withdrawal liability in federal district court. While this rule was adopted in the context of a motion to compel discovery, this Court was well aware of the significant effect this rule would have on all phases of this case and almost certainly on its final outcome.

Defendants offer several reasons in their motion for reconsideration why this Court should set aside this order. Those arguments, the substance of which were before this Court and considered in this Court's original ruling, will not be addressed here. Defendants have offered additional arguments which merit discussion.

Defendants assert that this Court should reconsider both the order of December 5, 1989, and December 8, 1989, because plaintiffs' voluntary proof of claim filed in the Williams' Kansas bankruptcy proceeding tolls the time within which defendants may initiate arbitration under the MPPAA. In support of this argument, defendants rely primarily on a recent Seventh Circuit opinion much to that effect. *Trustees of the Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund v. Central Transport, Inc.*, 888 F.2d 1161 (7th Cir. 1989) (*"Central Transport"*).

The general rule in the Seventh Circuit is that which this Court adopted in its December 8, 1989, order:

MPPAA requires that any dispute regarding a determination of withdrawal liability must first be brought to arbitration to preserve review of that dispute by review of the arbitration decision in federal district court. *Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1057 (7th Cir. 1988).

In *Central Transport*, the Seventh Circuit held that "when the Fund voluntarily filed a proof of claim in the bankruptcy court which was engaged in the reorganization of the employer whose actions prompted the alleged withdrawal liability, the time for filing arbitration under section 1401(a)(1) was equitably tolled, and the tolling of the time period under section 1401(a)(1) for seeking arbitration is extended until the final disposition of this case." *Central Transport*, 888 F.2d at 1165.

This holding, while adding to the rules applied by the Seventh Circuit, does not in any fashion modify the rule that withdrawal liability disputes must be arbitrated or they are waived. *Central Transport* is not an exception or modification of the latter rule. It holds only that the time period in which an employer must seek arbitration is tolled under certain narrow circumstances, not that a district court should decide issues which the employer has not taken to arbitration.

The issue of whether the time period in which the defendants has been equitably tolled in the instant case is not now before this Court. Nor does this Court believe that both parties to this case have had sufficient opportunity to explore this issue and express their views on this issue to this Court. The only issues before this Court in defendants' motion to reconsider are those addressed

in this Court's orders of December 5, 1989, and December 8, 1989. Finding that *Central Transport* is not applicable to the issues addressed in these orders, this Court will not reconsider these orders based on that opinion.

Defendants also argue that defendant Sexton, individually, and the Sexton Family Trust, as the alter ego of Mr. Sexton, are not "employers" within the meaning of MPPAA and are thus not liable as control group members. Plaintiffs argue that defendant Sexton is an "employer" within the definition of MPPAA under a "piercing the corporate veil" theory. This Court has previously, in response to defendants' motion for protective order and motion to dismiss, indicated its agreement with plaintiffs on this issue.

A review of the arguments set forth by defendants and plaintiffs in their suggestions in support and in opposition to defendants' motion for consideration indicates to this Court that its December 8, 1989, order must be clarified. In that order, this Court adopted the rule that an MPPAA employer which has not timely pursued arbitration of withdrawal liability disputes waives any defenses to withdrawal liability in a subsequent action by pension trustees in federal district court to enforce withdrawal liability payments.

This Court does not consider this rule to foreclose every defense defendant Sexton and the Sexton Family Trust may have to withdrawal liability. Defendant Sexton may still defend against personal liability by showing that there is no cause to "pierce the corporate veil."

MPPAA requires that any dispute concerning a determination of withdrawal liability be resolved through

arbitration. 29 U.S.C. § 1401(a)(1). An employer must initiate arbitration within 60 days of notification of a determination of withdrawal liability or within 120 after the employer has requested that the plan sponsor review its determination of withdrawal liability. 29 U.S.C. § 1401(a)(1)(A) and (B).

A prerequisite to MPPAA's arbitration requirement is notice of a determination of withdrawal liability. If one member of a control group receives notice, all members of a control group will be deemed to have received notice. *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 127-28 (3rd Cir. 1986).

In the instant case, plaintiffs sent notice of a determination of withdrawal liability to defendant Sexton as representative of Franklin Investment Group, Inc. and of S.L.C. of North America, Inc. It did not send notice of a determination of withdrawal liability assessed against Mr. Sexton personally nor did it send notice of withdrawal liability to the Sexton Family Trust (The issue of whether the Sexton Family Trust may be liable as a member of the control group in its own right has been raised by the parties. This issue is not properly before this Court as this time. This Court, thus, offers no opinion on that issue at this time.).

Should plaintiffs prove their allegation of individual liability of defendant Sexton under a "piercing of the corporate veil" theory, defendant Sexton and the Sexton Family Trust, as Mr. Sexton's alter ego, will be considered control group members. As such, they will be deemed to have received notice of the determination of withdrawal

liability, and any defenses to withdrawal liability will have been waived by failing to timely pursue arbitration.

Should plaintiffs fail to sustain their allegation of individual liability of defendant Sexton under a "piercing the corporate veil" theory, defendant Sexton and the Sexton Family Trust, as Mr. Sexton's alter ego, cannot be deemed to be members of the control group. As such, they have not failed to timely pursue arbitration of withdrawal liability disputes because the necessary notice prerequisite to the MPPAA's arbitration requirement has not been performed.

For the reasons stated above, this Court concludes that defendants Sexton and the Sexton Family Trust are not foreclosed from asserting defenses to individual liability based on plaintiffs' theory of "piercing the corporate veil." It is the resolution of this issue which will determine whether defendant Sexton and the Sexton Family Trust, as the alter ego of Mr. Sexton, are control group members.

Defendants also argue that the doctrine of laches bars plaintiffs' claim of withdrawal liability. This defense, however, has been waived by the control group members by their failure to timely pursue arbitration. If it is determined that defendants Sexton and the Sexton Family Trust are control group members under the theory of "piercing the corporate veil," they also have waived this defense. If, on the other hand, it is determined that defendants Sexton and the Sexton Family Trust are not control group members, they are not individually liable and the defense of laches will not be necessary.

Conclusion

The substantive defenses raised by defendants in their motion for reconsideration of this Court's order of December 5, 1989, granting plaintiffs' motion for partial summary judgment do not persuade this Court that interim payment of withdrawal liability should not be ordered. However, some defenses to the liability of defendants Sexton and the Sexton Family Trust remain viable. Defendants Sexton and the Sexton Family Trust have not alleged irreparable harm because of the order of interim payments, but the amount of interim withdrawal liability is quite sizable. On reconsideration of this matter, this Court concludes that plaintiffs will be sufficiently protected by the securing of a bond by defendants in the amount of any interim payment ordered. For this reason, the order of December 5, 1989, will be modified to allow the posting of bond in lieu of payment.

This Court concludes that the order of December 8, 1989, in which defendants' motion to compel discovery was denied, should not be reconsidered. The rule adopted by this Court in that order stands. However, this Court finds that the order should be clarified. The rule adopted by this Court in the order of December 8, 1989, does not foreclose any defense defendant Sexton and the Sexton Family Trust may have to individual liability under plaintiffs' theory of "piercing the corporate veil."

It is therefore

ORDERED that this Court's order of December 5, 1989, is modified to the extent that defendants may, in lieu of payment of interim withdrawal liability, post bond

with the Clerk of Court in the amount of interim withdrawal liability payment ordered. It is further

ORDERED that defendants' motion for reconsideration of this Court's order of December 8, 1989, is denied, except insofar as the parties' understanding of this order is inconsistent with the discussion above.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

January ___,1990

United States District Court

WESTERN DISTRICT OF MISSOURI

MICHAEL P. VAUGHN, et al.,
Plaintiffs,
V.
RONALD E. SEXTON, et al.,
Defendants.

JUDGMENT IN A CIVIL CASE

(Filed Aug. 14, 1991)

CASE NUMBER: 89-0211-CV-W-5

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiffs' motion for partial summary judgment under Count II of plaintiffs' complaint is granted. It is further

ORDERED that judgment is entered in favor of plaintiffs and against all defendants jointly and severally in the amount of $249,652.00 for withdrawal liability, plus $174,905.03 for interest, double interest and attorney's fees incurred to January 19, 1990, plus interest, double interest and attorney's fees and costs incurred since January 19, 1990, as yet to be determined. (order entered July 2, 1991)

It is hereby ORDERED, ADJUDGED, AND DECREED that Timothy J. Sear, be paid by defendants, jointly and severally, the sum of $4,916.25 as allowance of

compensation for professional legal services rendered and $334.85 for reimbursement of actual and necessary expenses incurred for the period of July 13, 1990, through July 25, 1991, for a total of $5,251.10, and that judgment be entered in this amount and be paid to the receiver from the assets of the defendants.

The Court also having entered final judgment in this case releases Timothy J. Sear from his duties as receiver in this case and Timothy J. Sear shall have no further duties or obligations to the parties in this case.

It is hereby ORDERED that, pursuant to this Court's order of July 2, 1991, plaintiffs are awarded an additional $36,439.21 in interest, $36,439.21 in double interest, $55.437.37 in attorney's fees and $12,739.09 in costs incurred subsequent to January 19, 1990. It is further

ORDERED that the Clerk of Court shall enter final judgment in this action.

Aug 14, 1991
Date

R. F. CONNOR
Clerk

Entered On Aug 14, 1991

C. Morrison
(By) Deputy Clerk

Document #285

Supreme Court, U.S.
FILED
JAN 15 1993
OFFICE OF THE CLERK

No. 92-1024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RONALD E. SEXTON, *et al.*,
Petitioners,

v.

MICHAEL P. VAUGHN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an employer waives a laches defense to a multiemployer pension plan's withdrawal liability claim in the plan's collection action by the employer's failure to request arbitration as mandated by 29 U.S.C. § 1401(a)(1)?

PARTIES TO THE PROCEEDING

Respondents, who were plaintiffs before the United States District Court for the Western District of Missouri and appellees before the United States Court of Appeals for the Eighth Circuit, are Michael P. Vaughn, Cindi S. Nance, Michael Craig, Lynn Nutt, W.W. Walderbach, Lawrence S. Jenkins, Patricia Scott and James G. Sheehan, in their capacities as present trustees of the Meatcutters Local 576 and Employers Kansas and Missouri Pension Plan.

Petitioners, who were defendants before the United States District Court for the Western District of Missouri and appellants before the United States Court of Appeals for the Eighth Circuit, are Ronald E. Sexton, individually and in his representative capacities as statutory trustee of Franklin Investment Group, Ltd., SLC of North America, Inc., Kalco, Inc., Kalco-Illinois, Inc., Jacpad Corporate Financial Services, Inc., Barclays Leasing Ltd., Commonwealth Leasing Corporation, and Congressional Insurance Agency Inc., and in his representative capacity as trustee of Sexton Family Trust.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1024

RONALD E. SEXTON, *et al.*,
Petitioners,

v.

MICHAEL P. VAUGHN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION

The respondent trustees of the Meatcutters Local 576 and Employers Kansas and Missouri Pension Plan respectfully pray that the Court deny the Petition for Writ of Certiorari ("Petition" or "Pet.") to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 14, 1992, as, *inter alia*, no conflict exists between the Circuit Courts of Appeal on the issue presented.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Eighth Circuit which is the subject of the Petition is reported at *Vaughn v. Sexton*, 975 F.2d 598 (8th Cir. 1992), and appears reprinted in the Peti-

tion at page A1 of the Appendix A thereto ("Pet. App. A").

The multiple orders comprising the decision of the United States District Court for the Western District of Missouri (Wright, D.J.), from which petitioners appealed to the Eighth Circuit Court of Appeals, have not been reported. With the exclusion of one order, all other orders comprising that decision are reprinted in the Petition at page A20 of the Appendix A thereto. The omitted order is reprinted in Appendix A hereto ("Res. App. A") at page 1a.

JURISDICTION

Respondents adopt the jurisdictional statement of petitioners found at page 2 of the Petition.

STATUTES INVOLVED IN THE CASE

29 U.S.C. § 1399(b)(1) provides as follows:

> As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—
>
> (A) notify the employer of—
>
> (i) the amount of the liability, and
>
> (ii) the schedule for liability payments, and
>
> (B) demand payment in accordance with the schedule.

29 U.S.C. § 1399(b)(2)(A) provides as follows:

> No later than 90 days after the employer receives the notice described in paragraph (1), the employer—
>
> (i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,
>
> (ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allowable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

29 U.S.C. § 1401(a)(1) provides in pertinent part:

> Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration . . . .

29 U.S.C. § 1401(b)(1) provides as follows:

> If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399 (b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

STATEMENT OF THE CASE

A. Background

When Sexton's company SLC bought the stock of Williams Meat in April 1984, the meatcutters had an ongoing collective bargaining agreement which obligated Williams Meat to make contributions to the multiemployer pension plan represented by respondent trustees. Pet. App. A2-3. Contract negotiations followed, but broke down in the midst of a Teamster strike in which meatcutters honored the Teamster picket line. The meatcutters' contract expired in August 1984, thereby triggering "withdrawal liability", or an obligation on the part of the withdrawing employer to pay its proportionate share of the unfunded vested benefits of the pension plan in an amount statutorily determined in accordance with the Employee Retirement Income Security Act ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1001 *et seq.* Pet. App. A3. *See* 29 U.S.C. §§ 1381(a) and (b)(1),

1383(a)(1) and (e), and 1391. (Hereinafter, all citations to statutes are to 29 U.S.C. unless otherwise noted.)

In early 1987, Williams Meat filed for bankruptcy under Chapter 11, later converted to Chapter 7. In January 1988, the respondent pension plan trustees filed a proof of claim for withdrawal liability in the Williams Meat bankruptcy. Pet. App. A3.

After correspondence seeking information covering identity and existence of "control group" members, in June 1988, the respondent trustees sent additional and separate notice of and demand for withdrawal liability payment to Sexton in his capacities as representative of SLC and Franklin Investment Group, related entities deemed by the MPPAA to be one and the same employer for purposes of withdrawal liability notice and payment. Pet. 5; Pet. App. A3-4, A9 (and cases cited therein); Appellants' Appendix filed in the Eighth Circuit ("At. App.") 113, 115; Appellees' Appendix filed in the Eighth Circuit ("Ae. App.") 70. *See* §§ 1301(b)(1) and 1399(a). Likewise, in August 1988, the respondent trustees notified Sexton in his capacity as representative of SLC and Franklin Investment that a default on the amount of the withdrawal liability assessed would occur 60 days after receipt of the notice if withdrawal liability payments were not made. Pet. 5; Pet. App. A23. *See* § 1399(c)(5). Although correspondence was received by the Plan in which liability was denied, none of the petitioners receiving actual or constructive notice of the withdrawal liability, or notice of default in payment thereof, requested a review of the withdrawal liability assessment or timely requested arbitration of any dispute concerning that liability assessment. Pet. 5; Pet. App. A4, A23-24; Ae. App. 70. *See* §§ 1399(b)(2)(a) and 1401(a)(1).

B. Proceedings Below

In March 1989, the respondent pension plan trustees sued to collect the now "due and owing" withdrawal liability (*see* § 1401(b)(1)) from SLC and Franklin Investment and from Sexton individually and in his representative capacity as trustee of the Sexton Family Trust, a revocable trust of which Sexton was grantor, trustee and a beneficiary. Later, other related corporate entities were added to the trustees' lawsuit. Pet. App. A4. In various orders and ultimately via summary judgment, the District Court held, *inter alia*, that petitioners had waived their laches defense to respondents' claim of withdrawal liability by petitioners' failure to request arbitration as required by § 1401(a)(1), and accordingly entered judgment against petitioners for approximately $550,000. Pet. App. A32, A40, A43; Res. App. 1a. On appeal, the Eighth Circuit affirmed the District Court's rulings in all respects for which petitioners had sought review, including waiver of their laches defense. Pet. App. A4-8, A19.

REASONS FOR DENYING THE WRIT

Petitioners seek discretionary review by this Court of only one issue from the affirmance of the judgment below: whether petitioners waived their laches defense to respondents' withdrawal liability claim in respondents' collection action by petitioners' failure to request arbitration as mandated by § 1401(a)(1). This Court should deny certiorari in this case because (1) there is no conflict among the courts of appeal, (2) the narrow issue presented is not of the import warranting review, (3) the issue is premature for review, (4) the ruling below is accurate and fair, and (5) any other result would be burdensome to multiemployer pension plans and ultimately detrimental to the pension recipients ERISA was intended to protect.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL REGARDING THIS PRECISE ISSUE; THE CASES RELIED ON BY PETITIONERS ARE DISTINGUISHABLE.

Petitioners are correct in their statement that § 1399 (b)(1) mandates that a multiemployer plan "must notify an employer of withdrawal liability 'as soon as practicable' after the employer's withdrawal from the plan." Pet. 9. Petitioners neglect, however, to remind the Court that ERISA also provides that an employer may request review by the plan of the withdrawal liability assessment, and to the extent a dispute "concerning a determination made under *sections 1381 through 1399*" of ERISA exists "*shall*" arbitrate such dispute, or the assessed withdrawal liability becomes "*due and owing*" in a subsequent action by the plan trustees to collect thereon. *See* §§ 1399(b)(2)(A), 1401(a)(1) and 1401(b)(1), respectively (emphasis added). Not only is it the mandatory, rather than permissive, language of these statutes, but also the reading of these statutes in *pari materia* which has led appellate courts faced with a withdrawal liability collection action where no arbitration has been requested by an employer to conclude that waiver of defenses is applicable. *See Robbins v. Admiral Merchants Motor Freight, Inc.*, 846 F.2d 1054, 1056-57 (7th Cir. 1988); *Teamsters Pension Trust Fund v. Allyn Transportation Co.*, 832 F.2d 502, 504-506 (9th Cir. 1987); *I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415 (D.C. Cir. 1987).

The cases cited by petitioners in support of a so-called "split" in the circuits might be persuasive, except for the fact that the issue before this court is not whether waiver applies to all defenses raised by an employer, or whether waiver should apply in every procedural circumstance in which an employer and plan find themselves before the court. Rather, the issue before this Court is limited to *only* whether waiver should apply to an employer's *laches*

defense in a *plan trustee's collection action* where the *employer has failed to request arbitration*, or in any other respects to affirmatively and timely seek relief from the assessed withdrawal liability. Therefore, the cases cited by petitioners, which deal with other than the laches defense or which deal with a different procedural posture than a collection action on failure to arbitrate, do not present the conflicting decisions among the circuit courts of appeal which petitioners claim warrant exercise of this Court's discretionary review. See *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578, 581 (2nd Cir. 1988), *cert. denied*, 488 U.S. 966 (1988) (no laches defense at issue; case began as declaratory judgment action by employer partnership filed before time for invoking arbitration had expired); *Mason & Dixon Tank Lines, Inc. v. Central States Southeast and Southwest Areas Pension Fund*, 852 F.2d 156, 161 (6th Cir. 1988) (no laches defense at issue; case originally arose via control group members' action in district court for injunctive relief after notice and assessment of withdrawal liability); *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund*, 787 F.2d 897, 897-99, 903 (3rd Cir. 1986) (no laches defense at issue; employer filed declaratory judgment action after notice and assessment of withdrawal liability; court emphasized that this was a "rare case" with "unusual circumstances" in which the bypass of arbitration would be allowed); *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri Industries*, 727 F.2d 1204, 1207-10 (D.C. Cir. 1984) (no laches defense at issue; company had requested arbitration, but refused to make accelerated payment of entire amount of withdrawal liability demanded by plan pending arbitration, triggering plan's suit to require such payment).

Even the only "laches" case cited by petitioners does not address the precise issue before this Court, and therefore cannot legitimately be cited as in direct conflict with the ruling of the Eighth Circuit in this case. In *In re Centric Corp.*, 901 F.2d 1514 (10th Cir. 1990), *cert. de-*

nied, 111 S. Ct. 145 (1990), the issue was not whether the pension plan trustees had delayed in their provision of notice of and demand for withdrawal liability to the detriment of the employer, as is asserted here by petitioners, but whether the pension plan trustees in *Centric* had *brought their collection action* so late as to prejudice the employer. Pet. App. A8. Petitioners are well aware of the real thrust of the Tenth Circuit case, quoting directly therefrom in their Petition at page 13:

> "Laches in the *prosecution of an action to collect the amount assessed* is not such a defense [which is waived by failing to arbitrate], for *it goes to the effect of a delay in bringing suit*, not to the merits of the claim."

Centric, 901 F.2d at 1518 (emphasis added). Thus, the Tenth Circuit's decision is no more a basis for grant of a writ of certiorari in this case, than the former answers whether or not an alleged failure to notify an employer of withdrawal liability "as soon as practicable" pursuant to 29 U.S.C. § 1399(b)(1) is a defense that "go[es] to the merits of the liability assessment itself" and therefore subject first to arbitration, *Centric*, 901 F.2d at 1518, or whether the Tenth Circuit's decision would have been the same under the different circumstances here where the "as soon as practicable" laches defense *could* have been brought before the arbitrator. See *id.* at 1518 ("[A] failure to arbitrate does not waive a defense that the employer does not yet have. . . . At the time the Trustees argue Centric should have initiated arbitration, the delay giving rise to the laches defense had not yet occurred.").

In *Robbins v. Chipman Trucking, Inc.*, 693 F. Supp. 628 (N.D. Ill. 1986), *aff'd*, 866 F.2d 899 (7th Cir. 1988), after an extensive analysis of withdrawal liability cases in the various circuits, Chief Judge Grady concluded that most of the cases in which an employer was allowed to contest withdrawal liability in federal court without first

going to arbitration were capable of categorization into one of three different types of cases. So, too, the cases cited by petitioners are distinguishable from the case before this Court and thus do not warrant the Court's exercise of discretionary review to consider a very distinct issue as to which there is yet to appear a direct conflict in the appellate courts.

II. THE NARROW ISSUE PRESENTED IS NOT OF THE IMPORT WHICH WARRANTS EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION.

Not only are there no circuit courts of appeal decisions in direct conflict with the Eighth Circuit's decision below, but the precise legal issue raised by the Petition is rare indeed. The Eighth Circuit could only find one case sporting the same issue. Notably, that court held that a laches defense based on § 1399(b)(1)'s "as soon as practicable" was waived if not arbitrated. *See ILGWU Nat'l Retirement Fund v. Smart Modes of California, Inc.*, 735 F. Supp. 103, 106-107 (S.D.N.Y. 1990). *See also Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1127 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989). Pet. App. A8.

Moreover, the facts of this case are also unique They involve a stock sale of the contributing employer, a refusal to honor a picket line, contract expiration and bankruptcy. See *supra* pp. 3-4. Various allegations by petitioners of peculiar damage exist as well, to wit, a settlement release and loss of corporate documents. Pet. 6-7. The uniqueness of the legal issue in this case is only equalled by the complexity of the factual setting in which it arises. The Court's first pronouncement regarding the "arbitration/waiver" issue as it applies to ERISA withdrawal liability might best be reserved for a case having a more universally applicable set of facts and issues to be addressed.

III. THIS ISSUE IS PREMATURE FOR REVIEW; DISCRETIONARY REVIEW SHOULD BE DEFERRED FOR FURTHER LOWER COURT DEVELOPMENTS REGARDING THIS ISSUE AND WAIVER IN GENERAL.

Given the few number of district and appellate courts which have had the opportunity to render an opinion on the issue presented by the Petition, the issue is premature for this Court's discretionary review. Such consideration should be deferred until other courts have addressed same.

Furthermore, the more general "waiver/arbitration" issue continues to receive its share of attention and refinement in the lower courts. Even those circuits whose cases petitioners have cited in support of their position have often found it necessary at a later date to explain and narrow the impact of their prior rulings. *See, e.g., Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1255 (3rd Cir. 1987) (which, as the District Court below noted at Pet. App. A26, emphasizes the extreme narrowness of *Dorn's Transp.* and concludes that the mandate of section 1401(a)(1) does not permit an employer to avoid arbitration by merely stylizing an issue as one of pure statutory interpretation). The Eighth Circuit, as well as other appeals courts who have not had an opportunity to address the waiver issue "head on", so to speak, should have an opportunity to do so, or to embellish upon the narrow issues that have been addressed as the occasion permits until this issue is ripe for Supreme Court review.

IV. THE RESULT BELOW IS ACCURATE AND FAIR, THEREBY MAKING EXERCISE OF THE COURT'S DISCRETIONARY JURISDICTION UNWARRANTED.

If all else pointed to the Court's grant of a writ of certiorari in this case, which it does not, the accuracy and fairness of the result below would still militate

against such an exercise of jurisdiction. Petitioners' loose reference to their laches defense based on respondents' alleged untimely notice of withdrawal liability (Pet. App. A34) as a question of statutory interpretation (Pet. i) works to no avail. The Eighth Circuit accurately characterized that defense as raising essentially factual issues and one which rightly should have been deemed waived if not resolved first in arbitration. Pet. App. A8. *See also Retirement Fund of Fur Mfg. Ind. v. Getto & Getto, Inc.*, 714 F. Supp. 651 (S.D.N.Y. 1989); *Central States Southeast and Southwest Areas Pension Fund v. MGS Transportation, Inc.*, 661 F. Supp. 54 (N.D. Ill. 1987); *In re Korman Corp. and Teamsters Pension Fund of Philadelphia*, 10 EBC 1608 (Pereles, Arb., Aug. 15, 1988).

From a fairness standpoint, the Eighth Circuit's affirmance of the District Court's application of waiver to petitioners' laches defense equally supports no certiorari review in this case. Unlike in the *Centric* case, the laches defense asserted by petitioners here could have been raised in arbitration. Furthermore, despite petitioners' attempts to blame the so-called untimely withdrawal liability notice of respondents for everything from a settlement release to loss of corporate documents, the fact still remains that, had petitioners exercised their right and obligation under ERISA to arbitrate this dispute, their laches defense would not have been waived. Whatever may be attributable to respondents, justifiably or not, the waiver of petitioners' defense is not one of them. The loss of that defense rests squarely on petitioners' shoulders, where it should stay.

V. ANY OTHER RESULT WOULD LEAD TO CONFUSION, CHAOS AND UNNEEDED EXPENSE FOR ALREADY FINANCIALLY BURDENED MULTIEMPLOYER PENSION PLANS TO THE ULTIMATE DETRIMENT OF THE PENSION RECIPIENTS ERISA WAS INTENDED TO PROTECT.

The purpose of ERISA is to secure that employees receive their vested benefits from private pension plans. *Central States Southeast and Southwest Areas Pension Fund v. Sztanyo Trust*, 693 F. Supp. 531, 537 (E.D. Mich. 1988). *See also ILGWU Nat'l Retirement Fund v. Levy Bros. Frocks, Inc.*, 846 F.2d 879, 880 (2nd Cir. 1988). ERISA's intentions are to be liberally construed to provide maximum protection to employees. *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 731 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979).

The Multiemployer Pension Plan Amendments Act to ERISA is a statutory scheme which has at its heart the "provision[] for informal, *expeditious* resolution of withdrawal liability disputes." *Clinton Engines*, 825 F.2d at 416 (emphasis added). It was molded with precision to provide ample opportunity to an employer to resolve any disputed withdrawal liability without compromising the purposes for which such liability was created in the first place—to shore up the financially burdened multiemployer pension plans responsible for providing retirement benefits to many of the nation's workers. *See id.*

In so doing, Congress mandated arbitration of withdrawal liability disputes. § 1401(a)(1). Furthermore, its

> intent to minimize delay in multiemployer pension plans' receiving payment is perhaps clearest in 29 U.S.C. § 1399(c)(2), which requires employers to make interim payments pending arbitration. . . . This intent—also apparent in the legislative history—has led courts to characterize the MPPAA as a "pay-first-question-later" statute.

Clinton Engines, 825 F.2d at 426-27 (footnote and citations omitted).

Finally, Congress also intended that at some point, multiemployer pension plans were to be able to act in reliance that whatever dispute might have been raised had been foreclosed. Then, attention could be turned exclusively to collection of the withdrawal liability payment "due and owing", rather than to continued debate over the legitimacy of the claim. § 1401(b)(1).

Despite the above-referenced, precisely crafted mechanisms for efficient and expeditious resolution of withdrawal liability disputes contemplated and put into place by Congress, this case is a perfect example of how a statutory scheme, despite its best intentions, can go awry. Five years since filing of the respondent pension plan trustees' § 1401(b)(1) *collection action* against petitioners (Pet. App. A4), $249,652.00 of unpaid withdrawal liability later (Pet. App. A43-44; Ae. App. 34), and an almost equal amount of statutory attorneys' fees, expenses, interest and double interest later, petitioners have argued and re-argued before every court to which they could get an audience, by right or discretion, a factual issue which should and could have been brought before the arbitrator and resolved at the outset of this dispute.

A different result in this case could only lead to a quagmire of confusion and chaos regarding what issues must, or do not have to, be resolved in arbitration of withdrawal liability disputes, particularly juxtaposed against a statutory backdrop which in no uncertain terms mandates the arbitration of *any* dispute concerning withdrawal liability. Even more egregious is the expense and delay to which multiemployer pension plans will be put in having to address these disputes in any or multiple forums as the employer purposely puts every obstacle available in the path of the payment of the assessed withdrawal liability.

Ultimately, of course, the loser is the intended winner —the pension recipient. A statute enacted to strengthen the financial integrity of pension plans, so that employees may be assured of receiving their pensions, will have been turned on its head. The real winner will be the party who began this end run around the statute in the first place.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 89-0211-CV-W-5

MICHAEL P. VAUGHN, *et al.*,
Plaintiffs

vs.

RONALD E. SEXTON, *et al.*,
Defendants.

ORDER

(Filed July 2, 1991)

Before this Court is defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. For the following reasons, defendants' motion for summary judgment will be denied; plaintiff's [sic] motion for partial summary judgment will be granted.

The facts of this case have been provided numerous times is[sic] several previous orders by this Court. They will not be set forth again in this order.

Fed.R.Civ.P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op.*, 838

F.2d 268, 273 (8th Cir. 1988). This burden is met once the moving party identifies portions of the record bearing out its assertions. *White v. McDonnell Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990).

Once the moving party has done so, a party opposing summary judgment may not rest merely upon the allegations in its pleadings. *Green v. St. Louis Housing Authority*, 911 F.2d 65, 68 (8th Cir. 1990). The burden shifts to the non-moving party to go beyond his pleadings and by affidavit or by "depositions, answers to interrogatories, and admissions on file" show that there is a genuine issue of fact to be resolved at trial. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2511 (1986).

In ruling on a motion for summary judgment, this Court must view all facts in a light most favorable to the non-moving party, and that party must receive the benefit of all reasonable inferences drawn from the facts. *Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir. 1989).

However, summary judgment is designed to remove factually unsubstantial cases from court dockets. *Smith v. Marcantonio*, 910 F.2d 500, 502-3 (8th Cir. 1990). This Court must, therefore, grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Defendants move for summary judgment on the ground that plaintiffs' claim for ERISA withdrawal liability asserted against Williams Meat Company was denied by the bankruptcy court. Subsequent to defendants' motion, the bankruptcy court, on agreement of the parties, entered its order allowing plaintiffs' claim against Williams

Meat Company. Defendants' motion for summary judgment will therefore be denied.

Plaintiffs move for partial summary judgment against all defendants under Count II of plaintiffs' complaint. Plaintiffs' motion is "partial" only in that plaintiffs seek time within which to file additional proof of accrued interest, attorney's fees and costs.

There are three groups of defendants in this case: numerous corporations all owned or controlled by defendant Ronald Sexton, the Sexton Family Trust, and Ronald Sexton individually.

This Court has already found that the defendant corporations are part of a single ERISA defined control group. These defendants did not request arbitration within the allowed time period after receiving notice of withdrawal liability. The corporate defendants, therefore, waived any defense they may have asserted to withdrawal liability. Summary judgment will, therefore, be entered against the corporate defendants jointly and severally under Count II of plaintiffs' complaint.

Defendant Sexton Family Trust will be deemed part of the control group only if it is found that it is a trade or business under common control of an employer. 29 U.S.C. § 1301(b)(1).

In the instant case, the Sexton Family Trust leased Las Vegas and Prairie Village condominiums and real property in Nevada to various corporate defendants. These activities are sufficient to make the Sexton Family Trust a trade or business under ERISA definitions. *Western Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892, 894-95 (9th Cir. 1988); *Central States Southeast and Southwest Areas Pension Fund v. Sztanyo Trust*, 693 F. Supp. 531, 537 (E.D. Mich. 1988); *Pension Benefit Guaranty Corp. v. Ouiment* [*sic*] *Corp.*, 470 F. Supp. 945, 948-49 (D. Mass. 1979). Summary judg-

ment will, therefore, be entered against the Sexton Family Trust under Count II.

Plaintiffs argue effectively that defendant Ronald Sexton is individually liable under a piercing of the corporate veil theory. Defendants argue with equal effect that the transactions set forth by plaintiffs as evidence in support of this theory are legitimate corporate dealings.

This Court finds that this issue need not be addressed. There is no question but that defendant Ronald Sexton controlled the defendant corporations and the Sexton Family Trust. As found above, the Sexton Family Trust is a trade or business for ERISA purposes and is thus a control group member. As the grantor, trustee and controlling entity of the Sexton Family Trust, defendant Ronald Sexton is deemed the employer of this unincorporated entity and is thus personally liable. 29 U.S.C. § 1301(b)(1); *see also Lafrenz*, 837 F.2d at 895 (individuals are personally liable for withdrawal liability as the sole proprietors of an unincorporated trade or business under their common control).

For the above reasons, it is hereby

ORDERED that defendants' motion for summary judgment is denied. It is further

ORDERED that plaintiffs' motion for partial summary judgment under Count II of plaintiffs' complaint is granted. It is further

ORDERED that judgment is entered in favor of plaintiffs and against all defendants jointly and severally in the amount of $249,652.00 for withdrawal liability, plus $174,905.03 for interest, double interest and attorney's fees incurred to January 19, 1990, plus interest, double interest and attorney's fees and costs incurred since January 19, 1990, as yet to be determined. It is further

ORDERED that plaintiffs shall submit on or before July 12, 1991, documentation of interest, double interest

accrued and attorney's fees and costs incurred from January 19, 1990, to the present. It is further

ORDERED that defendants shall submit any objections to the reasonableness of attorney's fees and costs on or before July 24, 1991.

/s/ Scott O. Wright
SCOTT O. WRIGHT
United States District Judge

July 2, 1991